WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5955

IN THE MATTER OF: Served August 10, 2000

Application of THOMAS B. HOWELL,)
Trading as PRESIDENTIAL DUCKS,)
for a Certificate of Authority --) Case No. AP-2000-07
Irregular Route Operations)

Applicant seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District. Old Town Trolley Tours of Washington, Inc., (Old Town), WMATC Carrier No. 124, filed a protest in opposition on February 29, 2000. The protest includes a request for oral hearing in the event we do not deny the application on the existing record. Applicant filed a reply on April 10.[1]

The Compact, Title II, Article XI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

An application for a certificate of authority must be in writing, verified, and in the form and with the information that Commission regulations require.[2] Commission Regulation No. 54 requires applicants to complete and file the Commission's application form. The form itself requires supporting exhibits. The evidence thus submitted must establish a prima facie case of fitness and consistency with the public interest.[3]

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[1] After applicant filed its reply, Old Town filed a response, even though neither Commission Rule No. 13 nor Regulation No. 54, which govern the filing of protests, provide for a response to a reply. Old Town asserts it is entitled to make this supernumerary filing because applicant's reply allegedly changes some of the information in the application. Under Regulation No. 54-04(d), a proper reply amplifies the representations made in the application without altering the substance, except to acknowledge and correct any errors subsequently discovered. Inasmuch as we rely only on those portions of applicant's affidavit supporting the reply that either amplify without substantive alteration or concede protestant's point, there is no basis for considering Old Town's supplemental filing.

[2] Compact, tit. II, art. XI, § 8.

[3] In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4966 (Nov. 8, 1996); In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4642 (Aug. 9, 1995).

Once applicant has made his prima facie case, the burden shifts to protestant to contravene applicant's showing.[4] In the case of an existing carrier, the burden is on protestant to show that competition from the applicant would adversely affect protestant to such a degree or in such a manner as to be contrary to the public interest.[5] The protest must be accompanied by all available evidence on which the protestant would rely.[6]

I. APPLICATION

Applicant proposes conducting sightseeing tours on land and water with two GMC model DUKW amphibious military vehicles, so-called "Ducks," seating 28 passengers each and renovated for commercial use.

Applicant's proposed tariff contains per capita rates and a charter rate and indicates his goal is to furnish "an informative and patriotic tour" offering entertainment and value "for the entire family." The land portion of applicant's tours will be conducted primarily in the vicinity of the National Mall. Shuttle van service to and from stops on the tour route will be made available at no additional charge.

Applicant filed a statement of net worth as of December 26, 1999, showing assets of $319,241; liabilities of $215,221; and net worth of $104,020. Applicant's projected operating statement for the first twelve months of WMATC operations shows WMATC revenue of $240,000; expenses of $179,741; and net income of $60,259.

Applicant certifies he has access to, is familiar with, and will comply with the Compact and the Commission's rules and regulations thereunder.

We find that applicant has complied with Regulation No. 54 and has established thereby a prima facie case of fitness and consistency with the public interest, notwithstanding applicant's planned use of amphibious vehicles in his sightseeing operations. We have found such vehicles fit for use in sightseeing operations in the past, including amphibious vehicles operated by Old Town.[7]

II. PROTEST

Old Town opposes the application both on public interest grounds and on fitness grounds.

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[4] Order No. 4966 at 2; Order No. 4642 at 3.

[5] In re Battle's Transp., Inc., No. AP-85-12, Order No. 2722 (June 20, 1985); see Old Town Trolley Tours of Washington, Inc., v. WMATC, 129 F.3d 201 (D.C. Cir. 1997) (existing carrier has standing to protest unfair competition).

[6] Commission Regulation No. 54-04(a).

[7] In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc., No. AP-96-44, Order No. 4941 (Sept. 25, 1996); In re D.C. Ducks, Inc., No. AP-94-21, Order No. 4361 (Aug. 9, 1994).

A. Public Interest

Old Town's public interest challenge rests on two contentions. First Old Town asserts that applicant is in violation of an agreement limiting his right to compete against Old Town, applicant's former employer. Second, Old Town argues that approving the application ultimately will lead to less Duck service being offered in the Metropolitan District, not more.

Our assessment of Old Town's public interest challenge begins with the presumption that promoting competition is consistent with the public interest -- insulating carriers from competition is not.[8]

1. Covenant not to compete

The protest asserts that applicant was employed by Old Town from January 1998 until September 1999 and that as a condition of employment applicant agreed not to compete with Old Town within one year of leaving Old Town's employ. The protest further asserts that the transportation proposed by applicant would duplicate a portion of the service Old Town offers under its WMATC certificate and that this duplicate service would violate the covenant not to compete. The protest argues that permitting applicant to violate the covenant would not be consistent with the public interest.[9]

The protest is supported by an affidavit from Old Town's general manager, David B. Cohen. Attached to the affidavit is a copy of an employment agreement signed by applicant. Section Seven of the employment agreement, titled "NON COMPETITION AFTER TERMINATION OF AGREEMENT," recites the terms of applicant's agreement not to compete with Old Town in Washington, DC, for a period of one year commencing on the date of applicant's termination from Old Town's employ.[10] Section Fourteen states that the agreement shall be interpreted under the laws of the District of Columbia.

Neither the Compact nor the Commission's Rules and Regulations expressly authorize the Commission to enforce or honor a postemployment covenant not to compete. To the contrary, we have held that insulating carriers from competition is inconsistent with the public interest.[11] On the other hand, it was not the signatories' intent in adopting the

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[8] In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 3-4 (Feb. 9, 1994).

[9] Protest & Request for Hearing at 5-6.

[10] According to Section Seven, during the one-year period, applicant specifically may not: "directly or indirectly own or operate any business" which would require applicant "to reveal, to make judgments on or otherwise use any confidential business information or trade secrets" belonging to Old Town; provide "tour, sightseeing or charter bus/trolley services" in competition with Old Town; act as an operations manager for any of Old Town's competitors; use any "knowledge or skills" acquired through employment with Old Town; or disclose any of the "secrets, methods, or systems" used by Old Town.

[11] In re Safai Mgmt. Co., t/a Para-Med Wheelchair Transp., No. AP-92-09, Order No. 3930 (Apr. 30, 1992).

Compact to interfere with management-labor relations.[12] It is reasonable to suppose, therefore, that the signatories expect the Commission to consider the public interest in honoring postemployment restrictions in employment contracts, at least to the extent consistent with governing law. The parties here have chosen the law of the District of Columbia to govern their agreement. Our review of pertinent case law reveals that the District of Columbia views postemployment covenants not to compete with "some suspicion."[13]

The leading case on this issue in the District of Columbia is Ellis v. James V. Hurson Assocs., Inc., 565 A.2d 615 (D.C. 1989). According to Ellis, a postemployment covenant not to compete is "a form of restraint of trade" that may be enforced in accordance with principles set out in the RESTATEMENT (SECOND) OF CONTRACTS (1981).[14] The following discussion of those principles in Ellis is helpful in analyzing the restraint before us.

> Section 186 [of the RESTATEMENT] sets forth the basic principle. "A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade. A promise is in restraint of trade if its performance would . . . restrict the promisor in the exercise of a gainful occupation." Section 188 amplifies this doctrine in the context of a promise of the type Ellis made, that is, a promise that imposes a restraint that is ancillary to an otherwise valid transaction. RESTATEMENT, supra at § 188(2)(b). Such promises are "unreasonably in restraint of trade" if:
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> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
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> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
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> Comment g to section 188 [of the RESTATEMENT] focuses in particular on postemployment restrictions. It observes that such restrictions are usually defended on the ground that the employee has acquired either confidential trade information (not an element here) or

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[12] Representatives from each of the three signatories testifying before Congress during consideration of the original Compact stated that the Compact does not negate or suspend labor laws. See District of Columbia, Maryland, and Virginia Mass Transit Compact: Hearings on H.J. Res. 402 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 86th Cong., 1st Sess. 105, 107, 110, 119 (1959) (statements of: Charles Fenwick, State Sen., VA; Robt. McLaughlin, Pres., DC Bd. of Comm'rs; Edward Northrop, State Sen., MD) (construing "fifth proviso" of § 3 of Act approving Compact, Pub. L. No. 86-794, 74 Stat. 1031 (1960)); District of Columbia, Maryland, and Virginia Mass Transit Compact: Hearings on H.J. Res. 402 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. 245 (1960) (statement of Jerome Alper, Esq.) (same).

[13] Gryce v. Lavine, 675 A.2d 67 (D.C. 1996).

[14] 565 A.2d at 618.

"the means to attract customers away from the employer." It then observes that "whether the risk that the employee may do injury to the employer is sufficient to justify a promise to refrain from competition after the termination of the employment will depend on the facts of the particular case." Thus, it explains, "if the employer seeks to justify the restraint on the ground of the employee's ability to attract customers, the nature, extent and locale of the employee's contacts with customers are relevant. A restraint is easier to justify . . . if the restraint is limited to the taking of his former employer's customers as contrasted with competition in general." Id.[15]

It appears Old Town's protest is designed to prevent competition in general. By asking us to deny the application, Old Town is asking us to restrain competition throughout the Metropolitan District, not just the District of Columbia. Moreover, the protest seeks relief that is not confined to barring applicant's use of any confidential information he may have acquired from Old Town or any attempt on applicant's part to contact preexisting Old Town customers. Rather, the protest says without limitation that Old Town seeks to restrain applicant "for one year from competing in direct competition with theme vehicles in an identical service."[16] Our reading of DC law does not support an unlimited ban on competition.

There is no support in the record for the limited ban endorsed by Ellis, either. There is no allegation in the protest and, more importantly, no statement in Mr. Cohen's affidavit that applicant's duties as operations manager brought him in contact with Old Town's customers,[17] and there is no suggestion on protestant's part that applicant has attempted to contact such customers, if indeed any exist.[18] Likewise, there is no testimony from Mr. Cohen establishing that applicant acquired any confidential information or trade secrets while in Old Town's employ or that applicant now is attempting to use such information or secrets in violation of the employment agreement.[19] Mr. Cohen testifies merely that applicant was employed by Old Town as an operations manager from January 1998 until September 1999 and that

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[15] Ellis, 565 A.2d at 618-19.

[16] Protest & Request for Hearing at 9.

[17] See Ellis, 565 A.2d at 619 & 621 n.16 (limiting scope of covenant to prohibit contact only with customers actually served by employee prior to termination).

[18] In this context, hotel concierges, ticket agents, etc., may be considered a sightseeing carrier's customers. Applicant for his part testifies that he "will not use agents to sell tickets." Howell Affidavit at 5.

[19] In this regard, it should be noted that comment g to Section 188 of the RESTATEMENT explains: "A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business."

applicant agreed to the noncompetition clause as a condition of his employment.[20]

We would not necessarily deny the application if there had been a breach, in any event. Our responsibility under Section 7(a)(ii) of the Compact is to protect the public, not referee private labor disputes. Consistent with the principles espoused in Ellis, we would need to be convinced that honoring noncompetition clauses in employment contracts tends to make sightseeing carriers more efficient and that the resulting efficiency gains passed on to the public outweigh the injury to competition. Even if we were so convinced, the public might be better served by approval of the application subject to the condition that applicant not contact any customers he once served on behalf of his prior employer, or trade on any confidential information or trade secrets he might have acquired while thus employed, until the covenant has run. That way there would be no general suppression of competition, and the public at large would not be unduly deprived of applicant's services. Old Town would still be entitled to pursue whatever remedy the judicial system might afford.

Our treatment of this issue should not be seen as validating the parties' agreement not to compete. Rather, we simply find that Old Town has failed to lay the necessary predicate for invoking its terms under DC law.

2. Ruinous competition

The protest also alleges that applicant's duplication of Duck service will have a "devastating effect" on this segment of Old Town's business.[21] This in turn will prove harmful to the public by generating competition that in addition to harming Old Town will cause the demise of applicant and ultimately lead to a reduced service to the sightseeing public.[22] We do not see where this argument has any basis in fact or theory.

Old Town is a well established carrier having conducted sightseeing operations in the Metropolitan District for approximately fourteen years. Old Town has a fleet of twenty-seven revenue vehicles, including six Ducks,[23] and apparently uses a network of commissioned agents to maximize ticket sales.[24] The idea that competition from a start-up carrier with only two vehicles, no sales network and no name recognition could wreak devastation on Old Town at a time when the Duck sub-market in the Metropolitan District just expanded by thirty-two percent in one year[25] is simply not believable.

Mr. Cohen's testimony is not to the contrary. He testifies that "there is a limited number of people interested in taking a sea/land

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[20] Cohen Affidavit at 5-6; Employment Agreement at 1, 3-4.

[21] Protest & Request for Hearing at 3-4.

[22] Id. at 5.

[23] Annual Report of Old Town as of Dec. 31, 1999.

[24] See Cohen Affidavit at 4 (discussing typical ticket agent fee).

[25] Id. at 3.

tour of the District of Columbia."[26] He estimates that twenty to thirty percent of the people who would otherwise use Old Town's Duck service will be attracted to applicant's service, instead.[27] It strikes us that the diversion of a finite percentage of a "limited" number of Duck passengers will not cause a substantial impact on Old Town. Without some quantification from Mr. Cohen of the financial impact on Old Town, we have no basis for concluding otherwise.[28]

Even if Old Town established a significant diversion of revenue and even if it were shown applicant could not continue operating much beyond one year, (sustaining operations for one year being the test of financial fitness, which applicant has demonstrated as discussed below), we do not see how this would harm the public.[29] Applicant's proposed rates for Duck service are lower than Old Town's.[30] The public will benefit for as long as applicant remains in business and offers service at rates lower than Old Town's.

We should also point out that characterizing applicant's projected market share as a diversion of passengers and revenue from Old Town is a bit misleading. Old Town has no exclusive claim on future Duck passengers. The Compact abolished individualized service territories for irregular-route carriers in 1991.[31] Today, the service territory specified in each irregular-route certificate is the entire Metropolitan District.[32] The Compact has always recognized the right of existing carriers to add vehicles to their fleets as development and demand dictate,[33] and it now recognizes the right of each existing carrier to launch a new service by simply filing an appropriate tariff.[34] Over one hundred twenty-five WMATC carriers currently have sufficient authority to operate a vehicle with the seating capacity of a Duck. It hardly matters that the prospect of competition in this instance originates from new quarters.

Old Town informs us from its self-appointed perch as the "pre-eminent carrier in the local market" that the "advent of a similar operation would not substantially add anything to the local market."[35] We do not share Old Town's view. We see Old Town as the only carrier

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[26] Id. at 3.

[27] Id. at 3.

[28] See In re Shaw Bus Serv., Inc., No. AP-85-25, Order No. 2819 at 14 (Feb. 4, 1986) (discussing protestants' failure to submit evidence of their finances).

[29] See id. at 14 (reaching same conclusion).

[30] For example, applicant's proposed fare for a single adult is $18. Old Town's corresponding fare is $20. Applicant's proposed fare for a 90-minute group charter is $450. Old Town's is $500.

[31] In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4996 at 3-4 (Jan. 8, 1997).

[32] Compact tit. II, art. XI, § 9(b).

[33] See Pub. L. No. 86-794, § 1, tit. II, art. XII, § 4(b), 74 Stat. 1031, 1037 (1960); Compact tit. II, art. XI, § 7(e).

[34] Compact tit. II, art. XI, § 14.

[35] Protest & Request for Hearing at 3.

in the local Duck sub-market. What applicant brings to that sub-market is competition. That is enough.

3. Public interest finding

After reviewing the evidence on this issue and considering Old Town's arguments, we find that Old Town has failed to overcome the presumption that the public is best served by promoting competition, not stifling it.

B. Fitness

The fitness inquiry focuses on an applicant's financial fitness, operational fitness, and regulatory compliance fitness.[36]

1. Financial fitness

To establish financial fitness, an applicant must show the present ability to sustain operations during the first year under WMATC authority.[37] The protest alleges that applicant has overestimated projected ridership and revenue, underestimated projected expenses and failed to adequately describe how his vehicles will be financed.[38]

Applicant explains in his affidavit in response to the protest that he intends to lease two Ducks and pay the owner twenty percent of gross revenue from operations.[39] We find this description of the financing arrangement adequate for determining whether applicant can sustain operations for one year, and while we agree with Old Town that applicant has likely overestimated first-year ridership and revenue and underestimated first-year expense, we believe the record supports a finding of financial fitness.

Applicant's most recent projections call for $240,000 in revenue from 14,000 passengers, based on a 28-passenger vehicle and a fifty-percent load factor.[40] This works out to an average fare of $14 per person, a reasonable estimate given applicant's proposed fare structure of $18 per adult and $9.50, on average, per child.[41] But the estimate of 14,000 passengers is unreasonable. Applicant cannot assume it will achieve in its first year of operation the same fifty percent load factor that Old Town needed several years to attain. There is enough evidence in the record, however, to derive a reliable range of ridership estimates and corresponding revenue and expense estimates.

To develop a range of ridership estimates we must determine the overall size of the Duck sub-market. Mr. Cohen testifies that each

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[36] Order No. 4966; Order No. 4642.

[37] Order No. 4966; Order No. 4642.

[38] Protest & Request for Hearing at 7-9.

[39] Howell Affidavit at 1-2. This portion of the affidavit amplifies the description of this arrangement that is set forth in the application without altering the substance. See Notes to Amended Exhibit B.

[40] Amended Exhibit B; Howell Affidavit at 4.

[41] Amended Exhibit D.

Duck consumes seven gallons of fuel per trip and 4,800 gallons of fuel per year.[42] That works out to roughly 686 trips per Duck, per year. Mr. Cohen also testifies that Old Town operated four Ducks last year at fifty percent capacity.[43] We know from Old Town's annual report and applicant's testimony that each Duck has a seating capacity of 28 passengers, not including the driver.[44] Four Ducks multiplied by fourteen passengers multiplied by 686 trips equals 38,416 passengers. Applying Mr. Cohen's 20 percent to 30 percent diversion factor yields an estimated first-year market share for applicant of 7,683 to 11,525 passengers.[45]

Using an average fare of $14 per person to calculate the corresponding revenue, it appears applicant can reasonably expect to generate $107,562 to $161,350 in gross revenue in the first year. Factoring in the twenty percent lease fee yields a first year net revenue estimate of $86,050 to $129,080.

As for the corresponding expense, we begin by estimating the number of first-year trips applicant is likely to perform since fuel, maintenance and repair expenses vary with the number of trips. Based on our estimates of 7,683 to 11,525 passengers, and assuming a one-third average capacity load factor, or nine passengers per trip, it appears applicant can reasonably expect its two Ducks to perform a combined 854 to 1,281 trips during the first year. This is consistent with applicant's projection of 1,000 first-year Duck trips without backup vehicles (14,000 passengers at 14 per trip) and with Old Town's experience of 686 trips per Duck, per year, with backup vehicles.

Mr. Cohen testifies that 4800 gallons of Duck fuel cost $7,200, or $1.50 per gallon.[46] He also testifies that it costs $10,000 per year to maintain and repair a Duck.[47] If we take Old Town's fuel cost of $10.50 per trip (7 gals. at $1.50/gal.) and Old Town's maintenance/repair cost of approximately $14.58 per trip ($10,000 for 686 trips), and multiply those factors by 854 to 1,281 first-year Duck trips, we see that in the first year of operation applicant can expect to spend from $8,967 to $13,451 for fuel and from $12,451 to $18,677 for maintenance and repairs.[48] Applicant's projection of $118,500 for other expenses[49] should not vary much, if at all, with the number of trips performed, and Old Town does not question this amount.

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[42] Cohen Affidavit at 4-5.

[43] Id. at 2.

[44] Annual Report of Old Town as of December 31, 1999; Howell Affidavit at 4.

[45] This assumes, of course, no expansion and no contraction in the Duck sub-market. Although Mr. Cohen's testimony indicates the Duck sub-market is expanding, assuming a static market produces conservative estimates.

[46] Cohen Affidavit at 5.

[47] Id. at 4.

[48] The estimate for maintenance and repair is conservative in that it does not reflect any reduction in cost for off-season maintenance borne by the owner.

[49] See Amended Exhibit B ($18,200 + $700 + $99,542).

Summing the projected expense numbers produces a total expense range of $139,918 to $150,627. After subtracting estimated total expense from estimated net revenue, we see that applicant may reasonably expect to incur a first year operating loss of $21,547 to $53,869.

Looking at applicant's balance sheet, we see he has sufficient current assets to cover his current liabilities and a first-year loss of up to $69,000. Based on Old Town's own numbers, therefore, it appears applicant can sustain operations for one year. We have found other carriers projecting a first-year loss financially fit in similar circumstances.[50]

2. Operational fitness

To establish operational fitness, an applicant must demonstrate that he is fit, willing and able to provide safe and adequate service.[51] The protest alleges that applicant has failed to adequately describe where his vehicles will be garaged, what condition his vehicles are in, how his vehicles will be maintained and repaired, how he will compensate for unscheduled equipment outages, and how his drivers will be trained.[52]

According to applicant, the two Ducks will be delivered by the lessor in "tour ready" condition, (including U.S. Coast Guard certification), garaged somewhere in the New York Avenue or Rhode Island Avenue corridors during the season and returned to the lessor for storage during the off-season.[53] Maintenance and repairs will be performed by a licensed repair facility.[54] Drivers will have the necessary licenses and will be trained by applicant.[55] Given applicant's experience as Old Town's operations manager, we find this response sufficient to rebut Old Town's operational fitness argument.

We agree with Old Town that applicant cannot reasonably expect both vehicles to experience zero unscheduled downtime.[56] But Old Town does not argue that a Duck service cannot be operated with only two vehicles.

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[50] E.g., In re Bethany Travel Agency, Inc., t/a Bethany Travel & Limo. Serv., & Bethany Limo. & Buses, Inc., No. AP-98-23, Order No. 5401 (Aug. 31, 1998) (applicant found fit where current assets were sufficient to cover current liabilities and projected loss); Order No. 4966 at 3 (same).

[51] See In re Safe Ride Servs., Inc., No. AP-97-03, Order No. 5098 at 3-4 (June 11, 1997) (discussing safety and adequacy); Order No. 4966 at 4-5 (discussing adequacy); Order No. 4642 at 5-6 (discussing safety and adequacy); Order No. 4361 at 6-8 (discussing safety).

[52] Protest & Request for Hearing at 6-7.

[53] Howell Affidavit at 2-3.

[54] Id. at 3.

[55] Id. at 5.

[56] Protest & Request for Hearing at 7.

Of course our approval of this application will be subject to the following safety and adequacy related conditions that were imposed in the application of D.C. Ducks, Inc.,[57] the first operator of amphibious sightseeing vehicles in the Metropolitan District. Applicant will be required to file proof that his vehicles have passed safety inspection by one of the signatories or the United States Department of Transportation in accordance with 49 CFR Part 396; proof that his vehicles have passed safety inspection by the U.S. Coast Guard; proof of current registration of said vehicles with the U.S. Coast Guard and DC Harbor Master; a copy of the common water carrier application filed with the DC Public Service Commission pursuant to 15 DCMR § 1701; a copy of each driver's commercial driver's license and pilot's license; and a copy of a Certification of Road Test prepared in accordance with 49 CFR § 391.31, showing administration of the test by applicant in applicant's amphibious vehicles.[58]

3. Compliance fitness

The protest argues that applicant's alleged breach of the aforementioned covenant not to compete is evidence of applicant's predisposition to commit regulatory violations.[59] We have already held, in connection with our examination of the public interest, that Old Town has failed to demonstrate any such breach. Further, the correlation between an applicant's breach of a covenant not to compete and the willingness and ability of an applicant "to comply with the statutes and regulations which govern its operations as a carrier," without more, is too weak to sustain a finding that applicant is unfit.[60]

4. Fitness finding

Based on the evidence in the record, the Commission finds that applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

III. REQUEST FOR ORAL HEARING

Because we have not denied the application on the existing record we consider Old Town's request for "an oral hearing . . . with opportunity for discovery and cross-examination of relevant witnesses." Old Town's request for hearing is actually two requests: a request for discovery and a request for oral hearing.

A request for discovery in an application proceeding is governed by Commission Rule No. 18-01,[61] which states that a request for subpoena must "specify with particularity the books, papers, or documents

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[57] See Order No. 4361 at 6-8.

[58] See id. at 9-10.

[59] Protest & Request for Hearing at 6, 9.

[60] See R&M Rigging & Transportation, Inc., Contract Carrier Application, No. MC-180227, 1985 MCC LEXIS 499 at *6-7 (ICC Apr. 15, 1985)(alleged breach of covenant by employee insufficient by itself for finding applicant unfit).

[61] Order No. 4996 at 3.

sought, and the facts expected to be proved thereby" and will be granted only on a showing of "general relevance and reasonable scope."

A request for oral hearing in an application proceeding is governed by Commission Regulation No. 54-04(b), which provides that a request for oral hearing must state reasonable grounds showing good cause for such a hearing, including a description of the evidence to be adduced and an explanation of why it cannot be adduced without an oral hearing.

The only particulars to be found in Old Town's discovery request concern applicant's state of mind regarding his "true financial picture," how he "intends to pay for the Ducks," how he will "repair and maintain the Ducks," who will "drive the vehicles and the scope of their experience and training," why the covenant not to compete was given "such short shrift," and the location where applicant's Ducks "will enter and leave the Potomac River."[62] This does not satisfy the requirement under Rule No. 18-01 to specify documents.

Holding an oral hearing -- with or without discovery -- is unlikely to shed any meaningful light on the record. Our finding of financial fitness is based on projections developed almost entirely from Mr. Cohen's testimony. Also, Old Town does not take issue with the facts presented in applicant's balance sheet but with the inference to be drawn therefrom, i.e., whether or not applicant has sufficient assets to cover his start-up costs. Applicant's balance sheet shows $60,000 in working capital. In our opinion that is enough to cover start-up costs, given the lease fee arrangement.

Our finding of operational fitness is subject to applicant filing the documents required by Commission Regulation No. 64 certifying the safety of his vehicles and the proper training and licensing of his drivers. Those are the facts that matter most.[63] Our finding of compliance fitness and consistency with the public interest reflects Old Town's failure to establish that applicant's duties while an employee of Old Town exposed him to confidential information and brought him in contact with Old Town's ticket agents -- matters within Old Town's knowledge as much or more so than applicant's -- so as to invoke the covenant not to compete.

We do not find merit in Old Town's professed concern over applicant's access to the Potomac River for the water portion of applicant's tours. For one thing, the water portion of the tour is out of our jurisdiction. Secondly, if applicant is unable to enter the river because of a lack of access points then it would seem that Old Town would be unable to enter the river as well, thus mooting any competition concerns. If Old Town is able to enter the river but applicant is not, that too would moot any competition concerns. In any event, Old Town does not raise any regulatory concerns on this point that we can discern from the protest.

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[62] Protest & Request for Hearing at 10.

[63] Order No. 5098 at 4 (citing Order No. 4361 at 6); see Order No. 4642 at 5-6 (discussing Reg. No. 64).

The requirement for an oral hearing in an application proceeding was eliminated in 1991.[64] The purpose was to reduce the burden on applicants in order to encourage applications from new carriers and thereby promote competition.[65] Today, oral hearings on applications for operating authority are the exception, not the rule.[66] Old Town has not shown good cause for invoking the exception.

IV. CONCLUSION

For the reasons discussed above, we deny Old Town's Protest and Request for Hearing and approve the application subject to the conditions specified below.

THEREFORE, IT IS ORDERED:

1. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 560 shall be issued to Thomas B. Howell, trading as Presidential Ducks, 11123 Stillwater Avenue, Kensington, MD 20895.

2. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

3. That applicant is hereby directed to file the following documents within thirty days: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the registered owner, for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; (f) proof of current safety inspection of said vehicle(s) by the United States Coast Guard; (g) proof of current registration of said vehicle(s) with the United States Coast Guard and DC Harbor Master; (h) a complete copy of all documents submitted to DCPSC under 15 DCMR § 1701, bearing indicia of proper filing; (i) for each initial driver, a copy of the driver's Commercial Driver's License and a copy of a Certification of Road Test prepared in accordance with 49 CFR § 391.31, showing administration of the test by applicant in applicant's amphibious vehicles; and (j) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61.

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[64] Order No. 4996 at 3-4.

[65] Id. at 3-4; Order No. 4243 at 3.

[66] Order No. 4996 at 4.

4. That the grant of authority herein shall be void and the application shall stand denied upon applicant's failure to timely satisfy the conditions of issuance prescribed herein.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND MILLER:

William H. McGilvery
Executive Director